

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WIZKIDS, INC.,

Plaintiff(s),

v.

WIZARDS OF THE COAST, INC.,

Defendant(s).

NO. C07-809MJP

ORDER ON PLAINTIFF'S MOTION
FOR LEAVE TO FILE SUMMARY
JUDGMENT

The above-entitled Court, having received and reviewed:

1. WizKids's Motion for Leave to File Motion for Summary Judgment (Dkt. No. 18)
2. Wizards' Opposition to WizKids' Motion (Dkt. No. 24)
3. WizKids's Reply in Support of Motion (Dkt. No. 26)

and all exhibits and declarations attached thereto, makes the following ruling:

IT IS ORDERED that the motion is DENIED.

Discussion

Plaintiff WizKids seeks leave to file a dispositive motion in advance of the claim construction hearing in this matter, a pleading which is not contemplated by the case schedule which has been established by the Court (Dkt. No. 16).

The motion which WizKids seeks to file is a summary judgment of invalidity, which it claims will obviate the need for a lengthy and expensive claim construction process. Plaintiff claims support for this departure from the case schedule from a recent Supreme Court case which held

Where, as here the content of the prior art, the scope of the patent claim, and the level of ordinary skill in the art are not in material dispute, and the obviousness of the claim is apparent in light of these factors, summary judgment is appropriate.

1 KSR Int'l v. Teleflex Inc., ___ U.S. ___, 127 S.Ct. 1727, 1745-46 (2007). Plaintiff wishes to file a
2 motion seeking summary judgment on grounds of obviousness based on prior art.

3 Plaintiff's argument (and its reliance on KSR) is valid only if the scope of the patent claims and
4 the level of ordinary skill of the art are not in dispute. Plaintiff argues that they are not, but the
5 argument and the evidence are not persuasive. The Court's analysis is more influenced by Defendant's
6 citations from the Federal Circuit:

7 It is elementary in patent law that, in determining whether a patent is valid and, if valid,
8 infringed, the first step is to determine the meaning and scope of each claim in suit.
9 Lemelson v. General Mills, Inc., 968 F.2d 1202 (Fed. Cir. 1992).

10 [A party] cannot avoid a full-blown validity analysis by raising the specter of invalidity
11 during the claim construction phase. Rhine v. Casio, Inc., 183 F.3d 1342, 1346 (1999).

12 Plaintiff attacks these citations as "pre-KSR," but KSR doesn't hold that the traditional
13 approach of claim construction prior to a determination of patent invalidity is now abrogated; all it
14 says is that, in certain circumstances (e.g., where the scope of the claims is not disputed) summary
15 judgment on validity is appropriate.

16 It is apparent from the parties' pleadings that claim construction will assist in the determination
17 of obviousness. Both the correspondence which they exchanged prior to initiation of the lawsuit and
18 the arguments regarding construction of claim terms in their briefs are evidence that the scope of the
19 claims here is still in dispute. Furthermore, the discovery process has just begun and no depositions
20 (including those of Plaintiff's game experts who are testifying as to the "ordinary level of skill"
21 required in this matter) have been taken.

22 The Court finds no reason to depart from its customary case schedule in patent cases and this
23 matter will proceed forward to the scheduled claim construction hearing. Plaintiff's motion will be
24 DENIED.

1 The clerk is directed to provide copies of this order to all counsel of record.

2 Dated: December _19_, 2007

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4 Marsha J. Pechman
5 U.S. District Judge